Radiant Preference Sdn Bhd & Ors v Mohaizi bin Mohamad & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO 22NCVC-270–06 OF 2014
NANTHA BALAN JC
13 APRIL 2015

Civil Procedure — Locus standi — Proper plaintiff — Claim for malicious prosecution and/or abuse of process — Tort committed against company — Whether shareholder or director of company may sue — Whether independent cause of action established

Civil Procedure — Costs — No order as to costs — Whether winning party exhibiting egregious and inexcusable conduct — Whether there was order as to costs made

Tort — Abuse of process — Elements — Elements to be proven to establish tort of abuse of process

Tort — Abuse of process — Want of reasonable and probable cause — Wrongful commencement of winding up proceedings — Instructions for commencement of winding up proceedings given by persons without authority — Winding up proceedings commenced in bad faith to do permanent and irreparable damage to company and its directors — Winding up proceedings commenced despite existence of moratorium to settle outstanding sums — Whether tort established — Damages not allowed due to failure to mitigate and remoteness of damage

Tort — Damages — Mitigation of damages — Plaintiff failing to act reasonably and mitigate damages — Whether loss recoverable

Tort — Damages — Remoteness of damages — Loss claimed not within realm of foreseeability — Whether loss recoverable

Tort — Damages — Special damages — Burden of proof — Failure to demonstrated requisite paper trail to establish loss of business or profits — Whether loss recoverable

Tort — Malicious prosecution — Want of reasonable and probable cause — Wrongful commencement of winding up proceedings — Instructions for commencement of winding up proceedings given by persons without authority — Winding up proceedings commenced in bad faith to do permanent and irreparable damage to company and its directors — Winding up proceedings commenced despite existence of moratorium to settle outstanding sums — Whether tort established — Damages not allowed due to failure to mitigate and remoteness of damage

The plaintiffs' action for the tort of malicious prosecution and abuse of process was based on the fact that the first plaintiff ('P1') was wrongfully wound up by Perbadanan Pengurusan Prima Peninsula ('PPPP') (who was not a party to this action). PPPP was the management corporation for a commercial building ('the building') in which P1 owned unit 1–5–2. A firm known as SPB&S Services ('SPB') was the property manager for the building. The first defendant ('D1') was the former Chairman of PPPP for the session 2012/2013. P3 had been elected as the Chairman of PPPP Council for 2013/2014. However, D1 had B1atantly refused to relinquish power as chairperson and conducted himself in such a manner as to thwart P3's functions as the chairperson. D1 continued to use PPPP's letterhead and issued notices as if he was still chairman. PPPP later obtained an injunction to restrain D1 from acting as Chairman of PPPP. SPB's services was also terminated. PPPP had earlier agreed to defer the filing of winding pp petition ('the petition') and allowed P1 to settle the outstanding maintenance charges for unit 1–5–2 by way of installment within a period of two years until February 2014 ('the moratorium'). Nevertheless, D1 (who was no longer Chairman of PPPP) had instructed the solicitors to commence winding up proceedings against P1 via letter dated 28 June 2013. The affidavit verifying petition ('the affidavit') was affirmed by the second defendant ('D2') who was an employee of SPB. PPPP claimed that it never instructed the solicitors to obtain the winding up order. The plaintiffs alleged that the instructions to file the petition was given by the defendants. As a consequence of the winding up order, the names of the directors of P1 (ie the second and third plaintiffs ('P2') and ('P3')) were listed in the database of CTOS Data Systems Sdn Bhd. The plaintiffs claimed that they had suffered loss and damages as a result. P1 claimed that it had to incur legal expenses in obtaining a permanent stay of the winding up order. P2 claimed that he had purchased shares and invested in a company called Vatratech Solution Sdn Bhd ('Vatratech') and was unable to open a corporate bank account for that company. P3 said that she could not obtain a bank loan because her name appeared in the CTOS database.

Held, allowing the P1's claim on liability but dismissing it on quantum; dismissing P2 and P3's claims on liability and quantum:

(1) As far as PPPP's records were concerned, SPB was terminated as property manager. Hence, D2 had no authority whatsoever to do anything with respect to the building and most certainly he had no authority to give instructions to the solicitors and/or to sign the petition or affidavit on behalf of PPPP (see para 33).

(2) The filing of the petition was done on the instructions of D1 and D2 who had no authority whatsoever to give any sort of instructions to the solicitors to commence winding up or any proceeding against P1. D1 and D2 were acting on their own accord or went on a frolic of their own and had embarked on a plan to wind up P1, most probably in retaliation for P3 being elected as chairperson and/or because SPB's services as property manager were terminated. SPB's contract was terminated in 27 June 2013 and D1's letter to the solicitors for winding up to be commenced against P1 was dated 28 June 2013. The close proximately between these two events led to the irresistible conclusion that D1's letter dated 28 June 2013 was a manifestation of retaliation on his part (see paras 34 & 46–47).

(3) PPPP could not validly file winding up proceedings in 2013 when they had given P1 a moratorium until February 2014 to fully settle the outstanding amount under the judgment sum. PPPP would be estopped from acting contrary to the moratorium that was given to P1 (see para 55).

(4) The winding up order against P1, was procured in an unlawful manner and was the product of D1/D2's unauthorised/illegal action in giving instruction to the solicitors and in D2's conduct of signing the petition and the affidavit. The purpose of commencing winding up proceedings was quite obviously to do permanent and irreparable damage to P1 and indirectly to P3 (see para 61).

(5) The first two elements in proving the tort of abuse of process had been proven on a balance of probabilities in that the sole and dominant purpose in the initiation of the winding up proceedings was to cause permanent damage to P1 and to embarrass P3 who was a director of P1. Thus, the purpose here was not just collateral but was also sinister. The conduct of D1 and D2 was egregious in the extreme and was inexcusable (see para 63).

(6) P1's only damage was a relatively small sum of RM7,000 being legal fees incurred in applying for a permanent stay. P1 had established all the requisite elements for the tort of abuse of process. However, the question as to whether P1 succeeded in obtaining judgment depended on whether they had acted reasonably and mitigated their damages (see paras 64 & 67).

(7) If a shareholder or director of a company intends to sue when a tort is committed against the company, then that shareholder or director may sue the tortfeasor provided he is able to establish his own independent cause of action. A wrong done to a company is not a wrong done to a shareholder or director. Here, there was no independent and separate cause of action; *Semesta Insurance Underwriting Agency Sdn Bhd v Koperasi Insurance (M) Bhd and Anor ('MCIS')* [2011] 3 MLJ 379 referred (see para 78).

(8) The only party who could sue for the tort of abuse of process or malicious prosecution was P1 and not P2 and P3. They had not pleaded any independent cause of action against D1 and D2. P2 and P3 lacked the requisite locus standi to sue for malicious prosecution and/or abuse of process. Hence, P2 and P3's claim ought to be dismissed (see para 79).

(9) P3 had not demonstrated the requisite paper trail to show that there was an application to the bank for a loan. There was no evidence as to how the loan monies were to be utilised and why after the winding up order was permanently stayed, the application for loan could not be revisited. There was no evidence that P3 had lost a commercial/business deal or any property purchase opportunity. As such, these alleged losses were not credibly proven. In any event, the question of difficulties or obstacles that may be faced by directors of a company that has been wound up in terms of loans/refinancing are all too remote and nebulous and are quite remote and do not fall within the realm of foreseeability. In the circumstances, P3 had not proven any losses (see paras 83–84).

(10) Vatratech maintained an account with OCBC Bank Bhd. There was no evidence that P2 was not allowed to be a signatory to this account. Further, whatever losses that P2 said he suffered may well have had everything to do with the management (or mismanagement) of Vatratech rather than the fact that he could not become a signatory to this account. In any event, the fact that P2 encountered difficulties with this account or that he was unable to control the finances of Vatratech were all far too remote to fall within the realm of any foreseeable loss damage. There was also no evidence that Vatratech had suffered losses and/or that P2 had sustained a loss of RM4.5m. Hence, P2 had also not proven any damages (see para 90).

(11) There was no attempt at mitigation of damages by P2 and P3. P1 was equally liable for failing to mitigate, which in the circumstances, could have been easily done by prevailing upon PPPP to withdraw the petition which would have obviated the need for any application for a permanent stay and consequently there would have been no legal expenses associated with the filing of such an application (see paras 97 & 99).

(12) P1 succeeded in establishing liability against D1 and D2 for the tort of abuse of process, but had failed to mitigate its losses and thus failed on quantum. P2 and P3 failed on liability and quantum (see para 101).

(13) In view of D1 and D2's egregious and inexcusable conduct, no order as to costs was made in respect of P2 and P3's claims which were totally dismissed (see para 102).

[Bahasa Malaysia summary

Tindakan plaintif-plaintif untuk tort kerana pendakwaan berniat jahat dan penyalahgunaan proses adalah berdasarkan fakta bahawa plaintif pertama ('P1') telah digulung secara salah oleh Perbadanan Pengurusan Prima Peninsula ('PPPP') (yang bukan pihak dalam tindakan ini). PPPP adalah perbadanan pembangunan untuk bangunan komersial ('bangunan tersebut') di mana P1 memiliki unit 1–5–2. Firma yang dikenali sebagai SPB&S Services ('SPB') adalah pengurus hartanah untuk bangunan tersebut. Defendan pertama ('D1') ialah bekas Pengerusi PPPP bagi sesi 2012/2013. P3 telah dipilih sebagai Pengerusi Majlis PPPP untuk 2013/2014. Walau bagaimanapun, D1 secara terang-terangan enggan melepaskan kuasa sebagai Pengerusi dan membawa dirinya seperti menghalang fungsi P3 sebagai Pengerusi. D1 masih terus menggunakan kepala surat PPPP dan mengeluarkan notis seperti dia masih Pengerusi. PPPP kemudian mendapat injunksi untuk menghalang D1 daripada bertindak sebagai Pengerusi PPPP. Perkhidmatan SPB juga telah ditamatkan. PPPP sebelum itu telah bersetuju untuk menunda pemfailan petisyen penggulungan ('petisyen itu') dan membenarkan P1 untuk menyelesaikan baki caj-caj penyelenggaraan untuk unit 1–5–2 melalui ansuran dalam tempoh dua tahun sehingga Februari 2014 ('moratorium tersebut'). Namun begitu, D1 (yang bukan lagi Pengerusi PPPP) telah mengarahkan peguam cara untuk memulakan prosiding penggulungan terhadap P1 melalui surat bertarikh 28 Jun 2013. Afidavit yang mengesahkan petisyen ('afidavit itu') telah disahkan oleh defendan kedua ('D2') yang merupakan pekerja SPB. PPPP mendakwa bahawa ia tidak pernah mengarahkan peguam cara untuk mendapat perintah penggulungan. Plaintif-plaintif mengatakan bahawa arahan-arahan untuk memfailkan petisyen telah diberikan oleh defendan-defendan. Akibat daripada perintah penggulungan itu, nama-nama pengarah P1 (iaitu plaintif-plaintif kedua dan ketiga (('P2') dan ('P3')) telah disenaraikan dalam pengkalan data CTOS Data Systems Sdn Bhd. Plaintif-plaintif mendakwa bahawa mereka telah mengalami kehilangan dan kerugian akibat daripada itu. P1 mendakwa bahawa dia telah membeli syer dan melabur dalam syarikat bernama Vatratech Solution Sdn Bhd ('Vatratech') dan tidak dapat membuka akaun bank korporat untuk syarikat tersebut. P3 berkata bahawa dia tidak mendapat pinjaman bank kerana namanya kelihatan dalam pengkalan data CTOS.

Diputuskan, membenarkan tuntutan P1 berhubung liabiliti tetapi

menolaknya atas kuantum; menolak tuntutan-tuntutan P2 dan P3 berhubung liabiliti dan kuantum:

(1) Setakat mana rekod-rekod PPPP adalah berkaitan, SPB telah ditamatkan sebagai pengurus hartanah. Justeru D2 tiada kuasa apa pun untuk berbuat apa-apa berkaitan bangunan tersebut dan sudah tentu dia tiada autoriti untuk memberi arahan kepada peguam cara dan/atau menandatangani petisyen atau afidavit bagi PPPP (lihat perenggan 33).

(2) Pemfailan petisyen dilakukan atas arahan D1 dan D2 yang tidak mempunyai autoriti apa pun untuk memberikan apa-apa jenis arahan kepada peguam cara bagi memulakan penggulungan atau apa-apa prosiding terhadap P1. D1 dan D2 bertindak sendiri atau suka-suka sendiri dan telah memulakan rancangan untuk menggulung P1, berkemungkinan besar bertindak balas kerana P3 dipilih sebagai Pengerusi dan/atau kerana perkhidmatan SPB sebagai pengurus hartanah ditamatkan. Kontrak SPB telah ditamatkan pada 27 Jun 2013 dan surat D1 kepada peguam cara untuk penggulungan telah dimulakan terhadap P1 bertarikh 28 Jun 2013. Jarak masa dekat antara dua kejadian tersebut membawa kepada kesimpulan yang tidak dapat dinafikan bahawa surat D1 bertarikh 28 Jun 2013 merupakan tanda tindak balas di pihaknya (lihat perenggan 34 & 46–47).

(3) PPPP tidak boleh dengan sah memfailkan prosiding penggulungan pada 2013 apabila mereka telah memberikan P1 moratorium sehingga Februari 2014 untuk menyelesaikan sepenuhnya jumlah baki terhutang di bawah jumlah penghakiman. PPPP akan diestop daripada bertindak bertentangan dengan moratorium yang telah diberikan kepada P1 (lihat perenggan 55).

(4) Perintah penggulungan terhadap P1, telah dibuat secara tidak sah dan merupakan hasil tindakan D1/D2 yang tidak diberi kuasa/menyalahi undang-undang dalam memberi arahan kepada peguam cara dan dalam perlakuan D2 menandatangani petisyen dan afidavit. Tujuan prosiding memulakan penggulungan agak jelas menjejaskan secara tetap dan tidak boleh dibetulkan kepada P1 dan secara tidak langsung kepada P3 (lihat perenggan 61).

(5) Dua elemen pertama dalam membuktikan tort penyalahgunaan proses telah dibuktikan atas imbangan kebarangkalian di mana satu-satunya tujuan yang utama dalam memulakan prosiding penggulungan adalah untuk menyebabkan kedudukan P1 terjejas dan untuk memalukan P3 yang merupakan pengarah P1. Oleh itu, tujuan di sini adalah bukan sahaja kolateral tetapi juga mencurigakan. Perlakuan D1 dan D2 betul-betul ekstrem dan tidak boleh dimaafkan (lihat perenggan 63).

(6) Kerugian P1 hanya sejumlah kecil iaitu RM7,000 iaitu yuran guaman yang ditanggung dalam memohon penggantungan kekal. P1 telah

membuktikan semua elemen yang diperlukan untuk tort penyalahgunaan proses. Walau bagaimanapun, persoalan berhubung sama ada P1 berjaya memperoleh penghakiman bergantung kepada sama ada mereka telah bertindak secara munasabah dan mengurangkan kerugiannya (lihat perenggan 64 & 67).

(7) Jika pemegang syer atau pengarah syarikat berniat untuk menyaman apabila tort dilakukan terhadap syarikat itu, maka pemegang syer atau pengarah boleh menyaman pelaku tort dengan syarat dia boleh membuktikan kausa tindakannya secara bebas. Kesalahan yang dilakukan kepada syarikat itu bukan kesalahan yang dilakukan kepada pemegang syer atau pengarah. Di sini, tiada kausa tindakan secara bebas dan berasingan; *Semesta Insurance Underwriting Agency Sdn Bhd v Koperasi Insurance (M) Bhd and Anor ('MCIS')* [2011] 3 MLJ 379 dirujuk (lihat perenggan 78).

(8) Satu-satunya pihak yang boleh menyaman untuk tort kerana penyalahgunaan proses atau pendakwaan berniat jahat adalah P1 dan bukan P2 dan P3. Mereka tidak mempli apa-apa kausa tindakan bebas terhadap D1 dan D2. P2 dan P3 tidak mempunyai locus standi yang dikehendaki untuk menyaman kerana pendakwaan berniat jahat dan/atau penyalahgunaan proses. Justeru, tuntutan P2 dan P3 patut ditolak (lihat perenggan 79).

(9) P3 tidak menunjukkan jejak dokumen yang diperlukan untuk menunjukkan bahawa terdapat permohonan kepada bank untuk satu pinjaman. Tiada keterangan tentang bagaimana wang pinjaman digunakan dan kenapa selepas perintah penggulungan telah digantung secara kekal, permohonan untuk pinjaman tidak boleh dikaji semula. Tiada keterangan bahawa P3 telah hilang rundingan komersial/perniagaan atau apa-apa peluang jualan hartanah. Oleh itu, kerugian yang dikatakan itu tidak boleh dipercayai telah dibuktikan. Dalam apa-apa keadaan, persoalan tentang kesukaran atau halangan yang mungkin dihadapi oleh pengarah-pengarah sebuah syarikat yang telah digulungkan dari segi pinjaman/pembiayaan semula agak terpencil dan kabur dan tidak terangkum dalam skop kebolehramalan. Dalam keadaan tersebut, P3 tidak membuktikan apa-apa kerugian (lihat perenggan 83–84).

(10) Vatratech mengekalkan akaun dengan OCBC Bank Bhd. Tiada keterangan bahawa P2 tidak dibenarkan menjadi penandatangan kepada akaun ini. Selanjutnya, apa-apa kerugian yang P2 katakan telah dialaminya mungkin berkaitan dengan pengurusan (atau ketidakpengurusan) Vatratech dan bukan fakta bahawa dia boleh menjadi penandatangan akaun ini. Dalam apa-apa keadaan, fakta bahawa P2 berhadapan dengan kesukaran dalam akaun ini atau bahawa dia tidak boleh mengawal kewangan Vatratech yang agak terpencil untuk

jatuh dalam skop kebolehramalan kerugian ganti rugi. Tiada juga keterangan bahawa Vatratech telah mengalami ketugian dan/atau bahawa P2 telah mengalami kerugian sebanyak RM4.5 juta. Justeru, P2 juga tidak membuktikan apa-apa kerugian (lihat perenggan 90).

(11) Tiada percubaan dalam mitigasi ganti rugi oleh P2 dan P3. P1 sama-sama bertanggungjawab kerana gagal untuk mengurangkan, yang mana dalam keadaan itu, dengan mudah dilakukan dengan mengekalkan yang PPPP menarik balik petisyen itu yang mungkin tidak memerlukan apa-apa permohonan bagi penggantungan kekal dan berikutan itu tidak terdapat apa-apa perbelanjaan perundangan dikaitkan dengan pemfailan permohonan sedemikian (lihat perenggan 97 & 99).

(12) P1 berjaya membuktikan liabiliti terhadap D1 dan D2 untuk tort penyalahgunaan proses, tetapi gagal untuk mengurangkan kerugiannya dan oleh itu gagal berhubung kuantum. P2 dan P3 gagal atas liabiliti dan kuantum (lihat perenggan 101).

(13) Berdasarkan perlakuan D1 dan D2 yang ekstrem dan tidak boleh dimaafkan, tiada perintah untuk kos yang dibuat berkaitan tuntutan-tuntutan P2 dan P3 yang sememangnya ditolak (lihat perenggan 102).]]]]]

Notes

For a case on abuse of process in general, see 12(1) *Mallal's Digest* (5th Ed, 2015) para 1.

For cases on damages in general see 12(1) *Mallal's Digest* (5th Ed, 2015) paras 213–366.

For cases on locus standi in general, see 2(3) *Mallal's Digest* (5th Ed, 2015) paras 6069–6176.

For cases on no order as to costs, see 2(2) *Mallal's Digest* (5th Ed, 2015) paras 2562–2565.

For cases on want of reasonable and probable cause, see 12(1) *Mallal's Digest* (5th Ed, 2015) paras 1028–1029.

Cases referred to

Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd & Ors [1995] 3 MLJ 417, CA (refd)

Asia Commercial Finance Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189, SC (refd)

Johnson v Gore Wood & Co (a firm) [2002] 2 AC 1, HL (refd)

Malaysia Building Society Bhd v Tan Sri General Ungku Nazaruddin bin Ungku Mohamed [1998] 2 MLJ 425, CA (refd)

Prudential Assurance Co Ltd v Newman Industries Ltd (No 2) [1982] Ch 204, CA (refd)

Semesta Insurance Underwriting Agency Sdn Bhd v Koperasi Insurance (M) Bhd

and Anor ('MCIS') [2011] 3 MLJ 379, HC (refd)

Legislation referred to

Companies Act 1965 s 218
Credit Reporting Agencies Act 2010
Strata Titles Act 1985 Second Schedule

Raja Saidatul Akhma Raja Lope (Nur Azali bin Nordin & Nur Atiqah with her) (Lope Maizura) for the plaintiffs.
Arumugam (Khairun Niza & Sawinderjit Kaur with him) (Aru & Co) for the defendants.

Nantha Balan JC:

THE CLAIM

[1] This is my judgment after a full trial of the action. The action by the plaintiffs herein is predicated on causes of action for malicious prosecution and abuse of process.

[2] The plaintiffs' action for the tort of malicious prosecution and abuse of process is based on the fact that the first plaintiff ('P1') was wrongfully wound up by Perbadanan Pengurusan Prima Peninsula ('PPPP') (who are not a party to this action). The winding up order was subsequently lifted by way of a permanent stay order.

[3] The plaintiffs allege that the instructions to issue the statutory notice under s 218 of the Companies Act 1965 and the filing of the winding up petition by the solicitors, were all done on the instructions of the defendants. As a consequence of the winding up order, the names of the directors of P1, that is, the second and third plaintiffs ('P2') and ('P3') respectively were listed in the database of CTOS Data Systems Sdn Bhd ('CTOS'), which is a credit reporting agency under the ambit of the Credit Reporting Agencies Act 2010.

[4] The plaintiffs maintain that they have suffered loss and damages as a result of the winding up order and the appearance of P2 and P3's name in the CTOS database and they therefore hold the defendants liable for all such losses that they have suffered. P1 claimed that it had to incur legal expenses in obtaining a permanent stay of the winding up order. P2 claimed that he had purchased shares and invested in a company called Vatratech Solution Sdn Bhd and was unable to open a corporate bank account for that company. However, during the trial P2 said that he suffered losses because he could not become a signatory to Vatratech Solution Sdn Bhd's bank account. P3 said that she could not obtain a loan from Bank Muamalat Berhad because her name appeared in

the CTOS database. As such, she claims that she too suffered losses.

BACKGROUND

[5] On 18 December 2013, P1 was ordered to be wound up by the High Court at Shah Alam under petition for Winding Up No 28–437–09 of 2013. The petitioner was PPPP. PPPP is the management corporation for a commercial building known as Wisma Prima Peninsula which is located in Taman Setiawangsa, Kuala Lumpur ('the building'). P1 is a company incorporated under the Companies Act 1965 and is the owner of unit 1–5–2 in the building. P1 is said to be a company which was set up solely to hold a unit in the building on trust for Islamic Information & Services Foundation ('IISF') which is an Islamic charitable body (see P1's Board of Directors Resolution p 232 Bundle B2).

[6] P2 and P3 are directors of P1 (see p 8 Bundle B1). However, during the trial it was admitted by P3 that according to the records of the Companies Commission of Malaysia ('CCM'), the shareholders of P1 are two Chinese gentlemen. According to P3, the company secretary of P1 had not updated the CCM records to reflect the name of the current shareholder. Counsel for the defendants made much of the fact that the shareholders of P1 are Chinese gentleman and is not owned by any Islamic body or persons of Islamic faith. However, I do not perceive this as a major issue and accept P3's explanation as regards the names of P1's shareholders. For reasons which will be apparent, nothing really turns as to the identity of the shareholders of P1.

[7] The first defendant ('D1') is the former Chairman of PPPP for the session 2012/2013. The second defendant ('D2') is an employee of a firm known as SPB&S Services ('SPB') which is a business registered with the CCM with registration No 002128471-U (see p 3 Bundle B1). SPB was the property manager for the building. Messrs Jeffrey Wong, Noorul, Ho & Lim ('the solicitors') acted for PPPP. The solicitors had previously taken legal action against P1 by reason of their default in paying maintenance charges to PPPP and obtained judgment against P1 for the sum of RM101,586.24 with interest at 8%pa from 31 December 2009 until full payment and costs of RM8,186 (p 22 Bundle B1). Subsequently, the solicitors commenced winding up proceedings and obtained the winding up order on 18 December 2013. The winding up order was based on P1's inability to pay their debts, that is, the balance of the judgment sum (RM66,747.61) (see para 5 of the Petition at p 201–201 Bundle B2).

[8] The following witnesses testified at the trial:

(a) plaintiffs' witnesses

(i) Sabariah bt Abdullah (P3)('PW1')*

(ii) Aznim bt Azhar ('PW2')

(iii) Mohd Basri bin Mat Nor ('PW3')

(iv) Syed Abdillah bin Syed Abas Alhabshee (P2)('PW4')*

(v) Noorulhuda bt Daud ('PW5')

(* I shall refer to PW1 and PW4 as P3 and P2 respectively)

(b) defendants witnesses

(i) Mohaizi bin Mohamad (D1) ('DW1')*

(ii) Muhammad Hanif bin Amir (D2) ('DW2')*

(iii) Wan Nor Izham bin Wan Nashar ('DW3')

(* I shall refer to DW1 and DW2 as D1 and 02 respectively)

ISSUES

[9] Upon conclusion of the trial, counsel for both sides agreed that the following are the issues that require a determination by this court. Thus, all the issues to be tried which were formulated during case management had become reformulated and somewhat more focused after the trial:

Liability:

(a) whether the issuance of the s 218 Notice dated 5 July 2013 and filing of the winding up petition on 23 September 2013 was done by the solicitors pursuant to the letter of instructions dated 28 June 2013 by D1 (p 377 B2) and the subsequent letter by D2 dated 24 September 2013 (p 41 B1)?

(b) whether the letters by D1 and D2 at p 377 B2 and p 41 B1 respectively are binding on PPPP?

(c) whether the letter by D1 at p 377 B2 was withdrawn at anytime?

(d) whether the findings made by the learned judge in Kuala Lumpur High Court OS No 24BNCVC-1228–07 of 2013 with respect to the conduct of D1 and those who acted on his instructions after PPPP's Annual General Meeting on 8 June 2013 can be reviewed by this court?

(e) whether D1's payment of costs of RM2,500 which was ordered against him by the Shah Alam High Court by way of the order dated 4 April 2014 granting a permanent stay of the winding up order is significant in the context D1's liability for the wrongful filing of the winding up petition?

(f) whether SPB had been terminated as property managers as at 27 June 2013 (p 492 B2)?

(g) whether D2 had the requisite legal authority to sign the winding up petition and to affirm the affidavit verifying petition on behalf of PPPP?

(h) whether P2 and P3 being directors of P1 have any cause of action against D1 and D2 arising out of and/or in connection with the winding up order which was wrongfully filed?

(i) whether the failure to add PPPP (who are the management corporation for the building) as a defendant in this suit is fatal?

Quantum:

(a) whether P2's claim for RM4.5m is a foreseeable loss or was too remote?

(b) whether P2's claim for RM4.5m has more to do with the management of Vatratech Solution Sdn Bhd rather than due to his name being in CTOS database?

(c) whether D1 and D2 are responsible or liable for P2's inability to become a signatory to Vatratech Solution Sdn Bhd's cheque account?

(d) whether P3 could have gone ahead with the renovations by getting re-financing after the winding up order was lifted?

(e) whether P3's claim for RM500,000 is a foreseeable loss or is it too remote?

[10] The chronology of events are as follows:

CHRONOLOGY OF EVENTS

No.	Date	Events
1.	5 May 2010	Perbadanan Pengurusan Prima Peninsula, through Messrs Jeffrey Wong, Noorul, Ho & Urn, filed a Summons No 52–14943 of 2010 at Kuala Lumpur Sessions Court against P1 for the sum of RM101,586.24 which was due and owing to PPPP as at 31 December 2009 (refer to pp 12–15 of B1).
2.	11 April 2011	PPPP obtained judgment against P1 in respect of the sessions court proceedings (refer to pp 22 of B1).
3.	26 August 2011	PPPP, through Messrs Jeffrey Wong, Noorul, Ho & Lim, served a notice pursuant to s 218 of the Companies Act 1965 to P1 (refer to pp 27-28 of B1).

4.	3 January 2012	Messrs Jeffrey Wong, Noorul, Ho & Lim confirmed by way of a letter to PPPP, that they have instructions to proceed with the filing of the winding up petition against P1 and enclosed six sets of winding up petition and affidavit verifying petition to be affirmed by Mohamad Basri bin Mat Nor, who was the Chairman of PPPP Council at the material time (refer to p 388 of B2).
5.	February 2012	PPPP held an annual general meeting. D1 was elected as the Chairman of PPPP Council for 2012/2013.
6.	3 February 2012	PPPP agreed to defer the filing of winding up petition and allowed P1 to settle the outstanding maintenance charges by way of installment within a period of two years until February 2014 (pp 1–2 B1) ('the moratorium').
7.	8 June 2013	PPPP held an annual general meeting. P3 was elected as the Chairman of PPPP Council for 2013/2014. D1 ceased to be the Chairman of PPPP Council and was only elected as a member of the PPPP Executive Council ('EXCO').
8.	27 June 2013	SPB's services were terminated (pp 492–493 Bundle B2) *Defendants maintain that there is no evidence that this letter was served on SPB as it was sent to a different address.
9.	28 June 2013	D1 (who was no longer Chairman of PPPP) instructed Messrs Jeffery Wong, Noorul, Ho & Urn to commence winding up proceedings against P1 via letter dated 28 June 2013 (refer to p 377 of B2).
10.	5 July 2013	Messrs Jeffrey Wong, Noorul, Ho & Lim, on behalf of PPPP* served a notice pursuant to s 218 of the Companies Act 1965 on P1 (refer to pp 389–391 of B2). *The plaintiffs' maintain that the said solicitors acted on the instructions of D1 who had no authority to give instructions on behalf of PPPP. D1 maintains that he withdrew his instructions.
11.	23 August 2013	Injunction Order from Kuala Lumpur High Court by way of Originating Summon No 24NCVC-1228–07 of 2013 to restrain D1 from acting as Chairman of PPPP (refer to pp 23–26 of B1).
12.	5 September 2013	Notice from PPPP which documented the handover of power from D1 to the new Chairman of PPPP, P3 pursuant to the order dated 23 August 2013 (Refer to p 29 of B1).

13.	23 September 2013	Messrs Jeffrey Wong, Noorul, Ho & Lim, acting on behalf of PPPP*, filed the winding up petition No 28–437–09 of 2013 against P1 in the Shah Alam High Court (refer to pp 180–195 of B2). *The plaintiffs' maintain that the petition was filed on the instructions of D1 but D1 maintains that he withdrew his instructions. Plaintiffs' maintain that D2 had no power to sign the Petition on behalf of PPP. D2 says that he has power based on the contract between PPPP and SPB (pp 379–384 Bundle B2) and based on PW5's advice.
14.	24 September 2013	D2, who was an employee of SPB, instructed Messrs Jeffery Wong, Noorul, Ho & Lim to proceed with the winding up against P1 via letter dated 24 September 2013 (refer to p 41 of B1).
15.	25 September 2013	The affidavit verifying petition, which was affirmed by D2*, was filed in the court (refer to pp 196–204 of B2) *The plaintiffs' maintain that D2 did not have the requisite power to affirm an affidavit on behalf of PPPP.
16.	18 December 2013	The Shah Alam High Court ordered P1 to be wound up (refer to pp 205–206 of B2).
17.	5 March 2014	P1, through Messrs Suhaimi Yahya & Co, filed an application for a permanent stay of the winding up order. Messrs Raja, Nor & Su Lynn took over conduct of matters from Messrs Suhaimi Yahya & Co (refer to pp 207–273 of B2).
18.	11 March 2014	Messrs Lope Maizura filed an affidavit for PPPP which was affirmed on 7 March 2014 by Mohamad Basri bin Mat Nor, Chuan Hooi Keat and Aznan bin Aziz, in respect of the winding up order, stating that PPPP had never instructed Messrs Jeffrey Wong, Noorul, Ho & Lim to proceed to wind up P1.
19.	4 April 2014	Shah Alam High Court granted a permanent stay of the winding up order (refer to pp 274–275 of B2).
20.	4 June 2014	Plaintiffs filed the writ and statement of claim against defendants in respect of this action.

DEFENCE

[11] The crux of the defence is to be found in para 23 (k) and (m) of the defence and are reproduced below:

(k) Tetuan Jeffoy Wong, Noorul, Ho & Lim kemudiannya menyediakan dan memfailkan Petisyen tersebut pada 23-9-2013 *di mana semua prosiding dalam Petisyen tersebut dibuat tanpa arahan Defendan-Defendan. Tambahan pula, Defendan Pertama bukanlah Pengerusi Perbadanan tersebut pada tarikh pemfailan Petisyen tersebut iaitu pada 23-9-2013*. Sebaliknya, Pengerusi Perbadanan tersebut pada tarikh 23-9-2013 adalah Plaintif Ketiga (sebelum status Plaintif Ketiga berubah menurut Perintah 1-10-2013).

(m) Berdasarkan kepada kenyataan-kenyataan di atas, *adalah jelas Defendan-Defendan tidak memberi sebarang arahan, tidak terlibat secara langsung mahupun tidak langsung terhadap sebarang tuntutan dan tindakanyang difailkan terhadap Plaintif Pertama*. (Emphasis added.)

Analysis and findings (Liability)

The winding up proceedings

[12] The appropriate starting point is the Annual General Meeting of PPPP on 8 June 2003 ('the 7th AGM') where P3 was elected as the Chairperson of PPPP. P3 was not a parcel proprietor. Rather, she was only a nominee of P1. D1 was unseated as chairperson but was elected as one of the executive committee ('EXCO') members for PPPP.

[13] However, owing to D1's conduct after the 7th AGM, P3 could not effectively function as chairperson and this was because D1 had blatantly refused to relinquish power as chairperson and conducted himself in such a manner as to thwart P3's functions as the chairperson. D1 even declared the 7th AGM as null and void and organised an extraordinary general meeting on 22 July 2013 to re-elect himself as Chairman of PPPP.

[14] According to P3, D1 continued to use PPPP's letterhead and issued notices as if he was still chairman. Quite naturally, P3 and the other members of the Executive Committee of PPPP had no choice and filed legal action to stop D1 in his tracks. It was against those tumultuous circumstances that Original Summons No 24NCVC-1228–07 of 2013 ('the OS') was filed. The grounds for the OS are as stated in the supporting affidavit at pp 280–358 of Bundle B2.

[15] Under the OS, PPPP obtained an interlocutory injunction dated 23 August 2013 against D1 (p 23–26 B1). On 1 October 2013, PPPP obtained a permanent injunction against D1 to restrain him from acting as Chairman of PPPP and a declaration that the 7th AGM was valid, (pp 363–364 B2).

[16] However, the court also ordered that EXCO members who are not parcel proprietors be disqualified from holding any position in the EXCO.

Thus, P3 was disqualified as an EXCO member and as chairperson. The grounds of judgment by the court in the OS in respect of its decision dated 1 October 2013 are found at pp 366–376 (B2).

[17] For present purposes, I shall reproduce the relevant part of the grounds of judgment in the OS which relates to D1's conduct post the 7th AGM:

> From the time of the 7th AGM on 8 June 2013 until the date of hearing of encl 43 on 1 October 2013, D1 for 'personal reasons' and 'interests' has refused to recognised the current MC and continued to conduct himself as if he is the valid Chairman of the MC. The minutes of the EGM held on 22 July 2013 show clearly how D1 had completely taken over the control, and management of the current MC. Therefore, the injunction in prayer (a) against D1 is necessary to restrain him from further causing mischief and interfering with the exercise of powers and functions of the current MC. The balance of convenience clearly tilts in favour of the plaintiff There would be more harm and damage caused to the MC if prayer (a) is not allowed.

[18] In this context it is also apposite to refer to the grounds of judgment dated 30 October 2013 in the OS (pp 65–76, B1) where the court opined as follows:

> As can be seen from the background facts set out above, and from the court's decisions regarding enclosures 4,00,(sic) and 43, *it is clear that D1 had caused undue hardship to the MC by his B1atant disregard of the results of the AGM held on 8 June 2013 and had insisted to continue functioning illegally as the chairman of the MC when clearly his term as chairman of the former MC for the previous session 2012/2013 had ended and he was no longer the Chairman of the MC. Through the unreasonable insistence of D1, in wanting to continue as chairman of the MC, the administration and management of the building almost come to a standstill, to the confusion and detriment of the proprietors of the units in the building*. The RM50,000 costs awarded to the current plaintiff in such a small sum that it can never compensate the MC which also has to pay its own solicitor and client costs. All such monies used by the MC belong to the proprietors of the units in the Building, which monies should rightly have been utilised for the management, maintenance and improvement of the building, and should not instead be dissipated for paying litigation costs which were necessitated by the unreasonable, defiant and illegal acts of D1. D1 is fortunate that he was not penalised with punitive costs but got away with nominal costs in this case. (Emphasis added.)
>
> (See p 75 Bundle B1)

[19] Hence, it is clear as night follows day that D1's conduct has already undergone curial scrutiny in the OS and has been appropriately determined by the court to be an illegal exercise of power by D1 as the purported Chairman of PPPP. That finding of fact was made by a court of competent jurisdiction and may not be revisited or disregarded or impugned. Quite significantly D1 did not appeal against the orders made by the High Court in the OS. Thus the

findings of fact in the OS as reflected in the grounds of judgment remain intact and the defendants are precluded from revisiting the correctness of those findings which have merged in the judgment and are now res judicata (see *Asia Commercial Finance Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189).

[20] However, notwithstanding the findings made by the court in the OS, D1 steadfastly and resolutely maintained during cross-examination that after 8 June 2013, he had no connection with PPPP. In his own words, he said '*selepas 8 Jun 2013, habisnya the AGM, saya withdraw yang makna saya tidak ada apa-apa kaitan dengan MC*'.

[21] However, it is my finding that D1 did not remain inert and passive after 8 June 2013 but rather he had actively behaved or conducted himself as if he was the Chairman of PPPP. Indeed, one of the significant actions of D1 was the issuance of a letter dated 28 June 2013 (p 377 Bundle B2) which was addressed to the solicitors and instructing them to proceed with winding up against P1.

[22] Before I come to D1's letter dated 28 June 2013 (p 377 Bundle B2) I should in terms of chronology, firstly, refer to PPPP's letter dated 27 June 2013 (p 492–493 Bundle B2), whereby SPB's services as property manager for the building was terminated. That letter was signed by P3 as the Chairperson of PPPP.

[23] Counsel for the defendants suggested that there is no evidence that this letter was sent to SPB because it was sent to 222–3–3–1 Jalan Megan Setapak, Taman Sri Rampai Kuala Lumpur whereas their actual address is 22–3–3–1 Jalan Megan Setapak, Taman Sri Rampai Kuala Lumpur. Further, counsel pointed out that the letter does not have SPB's official stamp on it. Hence, counsel for the defendants cast grave doubts over this letter and maintained that there was no evidence that SPB was terminated as at 27 June 2013.

[24] To my mind, if this letter was not sent to SPB then it is curious how D1 could say in his answer to question 7 in his witness statement (DW1A) that P3 had exercised her power as Chairperson and terminated SPB's services after she became Chairperson of PPPP. In my view, the answer given by D1 in his own witness statement (DW1A) is the surest proof that the letter (pp 492–493 B2) was indeed sent to SPB.

[25] It is therefore no coincidence that on the very next day, 28 June 2013, D1 issued the letter to the solicitors and instructed them to proceed with winding up against P1 (see p 377 B2).

[26] According to PW5, the solicitor from Messrs Jeffery Wong, Noorul Ho & Lim who handled the matter, D1's letter was never at any time withdrawn.

She said that she issued the s 218 notice and filed the winding up petition against P1 based on D1's letter dated 28 June 2013 and D2's verbal and written instruction. PW5's evidence in this regard (which I believe to be true and credible) was as follows,

> Q: Let's go to the second Winding-Up in 2013 at page 377 of bundle B2. This is a letter dated 28.06.2013 from PPP to your firm, who sign this letter?
>
> A: Dr Haji mohaizi bin Mohamad.
>
> Q: Were you ware that at that point time on 28.06.2013 Dr Haji Mohaizi bin Mohamad did not have authority to instruct on behalf of PPP?
>
> A: No I am not aware. I do not know.
>
> Q: When you proceeded to issue the 218 Notice, you proceeded the 218 Notice based on this instructed dated 28.06.2013?
>
> A: Yes, based on Hani/ verbal instruction and it is confirmed by this letter.
>
> Q: When you proceeded the second Winding-Up Petition in 2013, your 218 Notice dated 5'1' July, you proceeded based on number one, Hanifis verbal instruction supported by written confirmation letter dated 28.06.2013 sign by Mohaizi?
>
> A: Yes exactly and also further instruction from Hanifon 24'\
>
> Q: Further instruction?
>
> A: Further instruction to proceed with the Winding-Up Petition.

[27] It is relevant to note that D1's letter dated 28 June 2013 (p 377 B2) and D2's letter dated 24 September 2013 (p 41 B1) are identically worded and they both read as:

> Re winding up petition against Radiant Preference Sdn Bhd
>
> Refer to the above matter, kindly proceed with winding up proceeding against the above company.

[28] It is material to note that other than D1's oral evidence, there is nothing to corroborate his testimony that he withdrew his written instructions to the solicitors. Also PW5 had testified that as far as she was concerned, D1's letter (p 377 B2) was never withdrawn. She said that she was not aware that D1 was no longer Chairman of PPPP when he sent the letter. She also testified that D2 could go ahead and sign the winding up petition and affidavit verifying petition, if he had the authority. She said, 'He can sign if he has authority to sign'.

[29] As such, the question that arises is whether D1 had authority to issue the letter dated 28 June 2013 and whether D2 had authority to give verbal and written instructions (letter dated 24 September 2013 - p 41 B1) and to sign the winding up petition and affidavit verifying petition on behalf of PPPP.

[30] I will deal with D2's authority first. In so far as D2's authority to sign any document on behalf of PPPP is concerned, it is my view that his authority, if any, ended upon the termination of SPB as property manager for the building pursuant to PPPP's letter dated 27 June 2013 (p 492–493 Bundle B2). As stated earlier, counsel for the defendants urged the court to reject this document as it was sent to the wrong address that is, 222–3–3–1 Jalan Megan Setapak, Taman Sri Rampai,Kuala Lumpur whereas the proper address for SPB&S should be 22–3–3–1 Jalan Megan Setapak Taman Sri Rampai, Kuala Lumpur.

[31] Also it was pointed out that there is no evidence as to the identity of the person who received the letter and lastly there is no stamp from SPB confirming that they have acknowledged receipt of the letter. This letter was signed by P3 in her capacity as Chairperson of PPPP (session 2013/2014).

[32] The answer to this lies in D1's own evidence. In this regard, it is significant that D1 himself had acknowledged in his witness statement ('DW1A') in his answer to question No 7 that after P3 was elected as the chairperson at the AGM on 8 June 2013, she had terminated the services of various parties including the property manager for the building. D1's question and answer on SPB's termination are reproduced below:

> Q7: Sila rujuk kepada perenggan 8(i) hingga (Hi) di muka sural 5 dan 6 Ikatan Pliding. Plaintif Plaintif telah mendahva bahawa sehpas AGM tersebut, kamu telah cuba untuk meneruskan kuasa-kuasa sebagai seorang Pengerusi PPPP antaranya dengan menggunakan ftepala swat ('letterheads') Pengerusi PPPP, mengeluarlcan notis-notis menyatalmn ketidakesahan AGM tersebut dan membelakangkan keputusan Ahli Majlis Plaintif. Adakah kamu bersetuju dengan dahvaan P laintif-Plaintif ini?
>
> A: Saya tidak bersetuju dengan dahvaan PJaintif-P'laintif ini kerana selepas AGM tersebut diadalian, kuasa saya sebagai bekas Pengerusi PPPP bagi sesi 2012/2013 telah diambil alih sepenuhnya oleh Plaintif ke-3 termasuk alcses kepada semua dokumen dan/atau buku cek PPPP malahan, Plaintif ke-3 juga telah bertindak, antaranya, seperti berikut:
>
> (i) menamatkan perlantikan kontraktor-kontraktor yang dilantik secara sebulat suata oleh Ahli Majlis Plaintif terdahulu bagi sesi 2012/2013 termasuk SPB & S Services tanpa pengetahuan dan/atau persetujuan sebulat suara Ahli Majlis Plaintif bagi sesi 2013/2014.

[33] As such, I find the defendants' disavowal of SPB's letter of termination to be more in the nature of an afterthought and I have no hesitation in rejecting the defendants' stance on the letter of termination. As far as PPPP's records are concerned, SPB was terminated as property manager with effect from the date of the letter. Hence, D2 obtains no authority whatsoever to do anything with

respect to the building and most certainly he had no authority to give instructions to the solicitors and/or to sign a winding up petition or affidavit verifying petition on behalf of PPPP.

[34] From the documentary and oral evidence, it is clear and quite indisputable that the issuance of the statutory notice under s 218 of the Companies Act 1965 on 5 July 2013 and filing of the winding up petition on 23 September 2013 was done on the instructions of D1 and D2 who had no authority whatsoever to give any sort of instructions to the solicitors to commence winding up or any proceeding against P1. PW3 who was previously a Chairperson of PPPP testified that the winding up petition was filed without PPPP's consent and that PPPP had even supported P1's application for a permanent stay of the winding up order.

[35] In this regard, it is appropriate to refer to PPPP's letter dated 25 February 2014 where it was confirmed that PPPP never authorised any winding up proceedings against P1. It reads as:

> Pihak Majlis Perbandaran Pengurusan Prima Peninsula tidak tahu menahu tentang perintah penggulungan yang dibuat terhadap Syarilmi Radiant Preference Sdn Bhd malah *pihak Majlis PPPPjuga tidak pernah bermesyuarat untuk mengambii sebarang tindakan terhadap Radiant Preference Sdn Bhd* ataupun melantik mana-mana firma guaman untuk memulalian tindakan penggulungan syarikat Radiant Preference Sdn Bhd.
>
> *Pihak majlis Perbadanan Pengurusan Prima Peninsula juga tidak pernah memberi kuasa kepada Muhammad Hanif bin Amir untuk mengikrarkan sebarang affidavit bagi pihak Perbadanan Pengurusan Prima Peninsula.*

[36] It is relevant to note that P1's application for a permanent stay was premised on the grounds, inter alia, that the winding up proceedings were commenced without the instructions of the petitioner (PPPP) (see p 209 Bundle B2).

[37] As stated earlier, D1 had, in the present suit, completely distanced himself from PPPP and says that he had nothing to do with the winding up of P1. As for D2, he says that he was advised by PW5 that he could sign the petition and affidavit verifying petition on behalf of PPPP as he was an employee of SPB whose contract dated 1 April 2013 (pp 375–386 B2) gave him the requisite power and authority to do all things necessary to recover monies that are due and owing by defaulters such as P1.

[38] However, PW5 said that D2 could sign the petition and the affidavit verifying petition *if he had authority to do so*. I note that it was not all elicited during cross-examination of PW5 that she had advised D2 that he could go ahead and sign the petition and affidavit verifying petition.

[39] I have read the whole of SPB's contract and find that it does not go so far as authorising D2 to affirm affidavits for and on behalf of PPPP. Counsel for the defendants also relied upon cl 6 of the Second Schedule to the Strata Titles Act 1985 (Act 318) and submitted that employees of SPB, as PPPP's agent, had statutory power to sign legal documents on behalf of PPPP. Clause 6 reads as:

> 6 Power to employ agents and servants
>
> The council may employ, for and on behalf of the corporation, such agents and servants as it thinks fit in connection with or to facilitate the exercise of the powers and the performance of the duties of the corporation.

[40] In my view, cl 6 of the Second Schedule is merely an enabling provision which allow a management corporation to engage an agent or servant to assist in carrying out their powers and duties. Indeed, if D2 is right, then it is akin to saying that by the SPB contract, PPPP had delegated its powers and duties to SPB which seems contrary to what is envisaged under the Second Schedule where delegation of powers and duties can only be made in favour of one of its members and not to a third party such as SPB (see cl 5 of the Second Schedule). Here, there was no power of attorney given by PPPP to SPB to take over conduct of legal action on its behalf.

[41] Further, the relevant clauses of SPB's contract relating to their duties and powers are couched in general terms and do not amount to a grant of contractual power to enable an employee of SPB to exercise powers of PPPP in the manner as is being asserted by D2.

[42] In particular, para IV of cl B of the SPB contract reads, as follows:

> To constant review of rental and other collection to ensure that all and Owner's Occupiers meet their financial obligation on time. You also have to review any arrears with Owner and initiation of legal action, with the Owner's or its legal representative.

[43] Next, paras I and III of cl C of the SPB Contract reads as:

> I. To recovery of any cost for which the tenants are liable under their tenancy/leasing
>
> ...
>
> II. To recommend appropriate action against defaulting tenants.

[44] The view that I have taken as regards SPB's limited scope of authority is fortified by the evidence of PW3 who stated that D2 was not authorised to affirm any affidavit or petition on behalf of PPPP. In this context, it should be noted that the first set of winding up cause papers (which was supposed to have been commenced against P1 in 2012) were in fact sent by the solicitors to PW3

as Chairman of PPPP for him to execute the same (see p 388 Bundle B2). This goes to show that PPPP had not delegated any power to SPB to execute legal papers on its behalf.

[45] The final point that has to be made in this context is whether PPPP had ratified or condoned D2's actions vis-a-vis the giving of instructions to the solicitors and the filing of the winding up petition against P1 and his conduct in signing the petition and affidavit verifying petition on behalf of PPPP.

[46] In this regard, there is absolutely no evidence whatsoever to implicate PPPP with the winding up proceedings. Ultimately, the evidence reveals that D1 and D2 were acting on their own accord or went on a frolic of their own and had embarked on a plan to wind up P1, most probably in retaliation for P3 being elected as chairperson and/or because SPB's services as property manager were terminated.

[47] As observed earlier, SPB's contract was terminated in 27 June 2013 (p 492–493 B2) and D1's letter to the solicitors for winding up to be commenced against P1 was dated 28 June 2013 (pp 377 B2). The close proximately between these two events leads me to the irresistible conclusion that D1's letter dated 28 June 2013 was a manifestation of retaliation on his part.

[48] If indeed, D1 did withdraw his letter, then it only stands to reason that he would have put it in writing. But he did no such thing. Instead, he said that he had verbally withdrawn his letter of instruction. PW5 said that as far she was concerned, there was no withdrawal of D1's instruction on commencement of winding up proceedings against P1.

[49] It is imperative to note that at all material times, *PPPP's moratorium that was given to P1 by way of letter dated 3 February 2012 (p 1–2 Bundle B1) was still in place. That letter was in fact signed by D1 when he was Chairman of PPPP. The moratorium on payment was never revoked and P1 was given two years (until 3 February 2014) to settle the judgment sum*. The relevant part of that letter reads as follow:

> (iii) *Pihak Perbadanan Pengurusan Prima Peninsula juga mencadangkan pihak puan agar dapat menyelesaikan bayaran tunggakan tersebut berjumlah RM101,586.24 dalam tempoh dua (2) tahun* beserta dengan bayaran semasa bulanan iaitu berjumlah RM886.10 setiap bulan. Jika pihak puan gagal menyelesaikan bayaran tunggakan tersebut dalam tempoh yang telah diberikan, pihak Perbadanan akan meneruskan proses winding-up dan menghantar notis 218 keatas pihak puan. (Emphasis added.)
>
> (see p1 Bundle B1).

[50] During the trial, reference was made to a letter dated 21 March 2012

which was allegedly issued by PPPP wherein there was a threat that a s 218 notice would be issued if P1 failed to pay the amount outstanding by 4 April 2012.

[51] Strangely, D1 who was chairman of PPPP at that time said during cross-examination that at no time was the two years moratorium period shortened. in fact he said he didn't know about this letter although he had referred to it in his witness statement (see Q13 at p 10 DW1A).

[52] His evidence in this regard merits reproduction:

Q. Saya bawa professor kepada m/s 387-B2. Setuju dengan saya bahawa ada satu cop di situ, cop oleh Saba Islamic Media. Adakah professor hadir dan melihat sendiri cop itu dikenakan kepada dokumen ini?

A. Saya tak tahu ada surat ini.

Q. 21 Mac 2012 professor telah dilantik menjadi pengurus kepada MC untuk sesi 2012/2013?

A. Ya, tapi MC yang menjalankan semua.

Q. Professor tak tahu sama ada surat ini telah diterima oleh Radiant Preference atau tidak?

A. Saya tak tahu.

Q. Professor setuju dengan saya cop bahagian bawah sebelah kanan alamatnya adalah berbeza dengan alamat di bahagian atas sebelah kiri?

A. Itu saya tak tahu.

Q. Membaca dokumen ini daripada rekod yang sedia ada, cop di bahagian bawah sebelah kanan, alamatnya dinyatalmn berbeza sama sekali dengan penerima di bahagian atas sebelah kiri?

A. Itu saya tak tahu.

Q. Sama ada penyerahan dihantar ataupun tidak professor tahu?

A. Tak tahu.

Q. Tapi professor berkebolehan untuk merujuk surat ini di soalan jawapan 13 penyata saksi professor di m/s 1O.

A. Saya tak tahu surat ini.

[53] It is also perplexing that during cross-examination of P3, counsel for the defendants sought to establish that up to the time of the winding up order, P1 had not settled the outstanding amount in full. For her part, P3 said that she was negotiating with PPPP and that some payments had been made.

[54] PW3 said that P1 had paid RM70,000. There is no doubt that RM70,000 was paid by P1 towards partial settlement of the amounts that were outstanding. In this regard, it may be noted that P1 made the following payments to PPPP:

RM	DATE
RM30,000	10 February 2013
RM10,000	10 March 2013
RM10,000	10 April 2013
RM10,000	10 May 2013
RM10,000	10 June 2013

(See letter dated 6 February 2013 from Islamic Information & Services Foundation and copies of five cheques at pp 241–242 Bundle B2)

[55] Regardless of whether there were monies owing by P1 to PPPP, the question is whether PPPP could validly file winding up proceedings in 2013 when they had given P1 a moratorium until February 2014 to fully settle the outstanding amount under the judgment sum. The answer is crystal clear in that PPPP would be estopped from acting contrary to the moratorium that was given to P1.

[56] As such, it matters not that when the s 218 notice was issued (5 July 2013) or petition was filed (23 September 2013) or the winding up order was made on 18 December 2013, P1 had not settled the judgment sum in full. Hence, the cross-examination of P3 along those lines were way off the mark and obfuscated the real issue which is whether D1/D2 had authority to give the requisite instructions to the solicitors to commence winding up proceedings against P1 and for D2 to sign the relevant cause papers for and on behalf of PPPP.

[57] In my view, D1 and D2 had absolutely no authority whatsoever to give any sort of instructions to the solicitors with respect to any form of legal action against P1.

[58] Quite clearly, the winding up proceedings were taken based on D1/D2's instructions and D2's execution of the petition and affidavit verifying petition which were all unauthorised, to say the least. As stated earlier, the action by D1/D2 were retaliatory in nature and in all probability was due to P3's action in terminating SPB's contract which is an entity co-owned by Wan Nor Izham bin Wan Nashar (DW3) who is also involved with a company called Endona Corp Sdn Bhd of which D1 was the chairperson, (see pp 313–314 B2) D1's son, Wan Nafis bin Mohaizi and DW3 were both directors and shareholders of Endona Corp Sdn Bhd (pp 307–308 B2).

[59] D1's son was General Manager of Endona Corp Sdn Bhd whereas DW3 was a manager of that entity. D1 and DW3 both disavowed the information that was stated in p 314 B2 (which was taken from the internet) and sought to distance themselves from having any connection with each other. In an organisational chart for Endona Corp Sdn Bhd, D1's son, Mohd Nafis Mohaizi is named as general manager, DW3 as executive operation manager and D2 (Muhammad Hanif) as the building coordinator. However, when confronted with the organisational chart, D1's terse answer was that these were all false information or '*palsu*'. To my mind, D1's answer is quite unbelievable as it implicitly suggests that the information sheet/organisational chart are all fraudulent documents. However, strangely D1 did not even bother to lodge a police report with regard to the information contained in these documents. D1's evidence is accordingly worthless and is therefore rejected.

[60] In any event, all these details about the connections between D1 and SPB/Endona Sdn Bhd have been ventilated in the OS and need not be regurgitated in these proceedings. Suffice to say that there is compelling evidence of a connection between SPB and Endona Corp Sdn Bhd and D1 in the manner described above and as such, the termination of SPB would necessarily have infuriated D1 quite apart from the fact that he had been ousted from the seat of power as Chairman of PPPP. Indeed, in the OS, the learned judge had referred to the fact that D2 was D1's agent and that PPPP had discovered that contractors appointed by D1 were companies run by D1's staff under Endona Corp Sdn Bhd (see p 68 Bundle B1).

[61] For all the reasons as stated above, it is my conclusion that the winding up order against P1, was procured in an unlawful manner and was the product of D1/D2's unauthorised/illegal action in giving instruction to the solicitors and in D2's conduct of signing the winding up petition and affidavit verifying petition. The purpose of commencing winding up proceedings was quite obviously to do permanent and irreparable damage to P1 and indirectly to P3 as well as she was obviously the 'thorn in D1's flesh'. I can think of no other reason. Quite clearly PPPP themselves did not regard P1 as a defaulter as the moratorium had not expired. As such, D1 and D2's conduct can only be described as a concerted plan to kill off P1 and harm P3 who was Chairperson of PPPP at the material time. The motive behind the winding up proceedings was all too clear and it was obviously to inflict maximum commercial harm or damage to P1 and to embarrass P3.

[62] As stated earlier, the plaintiffs' common cause of action was for malicious prosecution and abuse of process. I will first deal with abuse of process. In order to succeed in proving the tort of abuse of process, the plaintiffs have to demonstrate the following elements:

(a) The process complained of must have been initiated;

(b) The purpose for initiating that process must he some purpose other than to obtain genuine redress which the process offers. In other words, the dominant purpose for which the process was invoked must be collateral, that is to say, aimed at producing a result not intended by the invocation of the process; and

(c) The plaintiff must have suffered some damage or injury in consequence.

(See *Malaysia Building Society Bhd v Tan Sri General Ungku Nazaruddin Bin Ungku Mohamed* [1998] 2 MLJ 425).

[63] In my view, the first two elements as stated above have been proven on a balance of probabilities in that the sole and dominant purpose in the initiation of the winding up proceedings was to cause permanent damage to P1 and to embarrass P3 who was a director of P1. Thus, the purpose here was not just collateral but was also sinister. The conduct of D1 and D2 was egregious in the extreme and is inexcusable.

[64] In so far the question of damages is concerned, it is obvious enough that the direct impact of the winding up proceeding and winding up order was on P1. The others who may have suffered some collateral damage are the directors P2 and P3. I will deal with their so-called damage under the heading of quantum. It was clear from the evidence that P1's only damage was a relatively small sum of RM7,000 being legal fees incurred in applying for a permanent stay. The total fees itself was RM9,500 (see bill dated 21 February 2014 from Messrs Raja Nor & Su Lynn at p 523 Bundle B3). Out of this amount, P1 is only claiming RM7,000 as RM2,500 was already paid by D1 who had been ordered to pay costs of RM2,500 under the order for permanent stay of the winding up (see order dated 4 April 2014 at pp 274–275).

[65] According to D1, he paid off the sum of RM2,500 as he was advised to do so by his solicitors. It is evident from the order dated 4 April 2014 that the court had ordered costs against D1 and D2 who were responsible for the filing of the winding up petition.

[66] Back to the issue of damages, P1's claim here is confined only to RM7,000 and that is apparently the extent of their damage. P1 was not involved in any business or trading activities and was only holding the office unit in the building for the Islamic Information & Services Foundation.

[67] As such, P1 has established all the requisite elements for the tort of abuse of process and I should in the ordinary course of events allow P1's claim against D1 and D1 and order that damages in the sum of RM7,000 be jointly and severally paid by D1 and D2 to P1. However, the issue of damages cannot be divorced from the question of mitigation of damages, which is dealt with in

the later part of this judgment. Hence, the question as to whether P1 succeeds in obtaining judgment will depend on whether they had acted reasonably and mitigated their damages.

LOCUS STANDI OF P2 AND P3

[68] As for the claim by P2 and P3 who are directors of P1, I must admit that I have difficulty in terms of their locus standi to sue for the tort of abuse of process or even for malicious prosecution.

[69] The principal question is whether directors of a company can independently sue when a tort is committed against the company. Here, the tort of malicious prosecution or abuse of process was allegedly committed by D1/D2 against P1. Of course by winding up P1, it follows that the directors will be affected in a variety of ways. However, the issue is whether P2 and P3 can independently sue D1 and D2 for the tort of malicious prosecution and/or abuse of process when the tort was committed against P1.

[70] Counsel for the defendants relied upon the case of *Prudential Assurance Co Ltd V Newman Industries Ltd (No 2)* [1982] Ch 204 and submitted that a wrong done to a company does not vest any cause of action in favor of a shareholder or director. He relied on the following passage:

> The company is liable for its contracts and torts; the shareholder has no such liability. The company acquires causes of action for breaches of contract and for torts which damage the company. No cause of action vests in the shareholder ...
>
> (see p 224 of the judgment)

[71] Next, counsel also referred to the following passage in the decision of the Court of Appeal in *Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd & Ors* [1995] 3 MLJ 417 (CA), where it was held as follows:

> *We begin with the rule in Foss v Harbottle* (1843) 67 ER 189. *The rule has two limbs ...*
>
> ... The second limb of the rule is of much wider purport and is universal in its application. It is based upon the doctrine that only he who has been injured may sue. Translated into company law, the proposition may be stated thus. If a wrong has been done to a company, then it is the company which is the proper plaintiff in an action brought to redress the injuiy. An individual shareholder or even a group of shareholders forming a minority on the floor of a general meeting of the company have *no locus standi* to bring an action to remedy a wrong done to a company. See *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* 19821 Ch 204; [1982] 1 All ER 354; [1982] 2 WLR 31.
>
> Perhaps the clearest statement of the rule is to be found in the judgment of Jenldns LJ in *Edwards v Halliwell* [1950] 2 All ER 1064 at p 1066:

The rule in Foss v Harbottle, as 1 understand it, comes to no more than this. *First, the proper plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is prima facie the company or the association of persons itself.* Secondly, where the alleged wrong is a transaction which might be made binding on the company or association and on all its members by a simple majority of the members, no individual member of the company is allowed to maintain an action in respect of that matter for the simple reason that, if a mere majority of the members of the company or association is in favour of what has been done, then cadit quaestio.

see p 426 of the judgment

The decision of the English Court of Appeal in *Wallersteiner v Moir (No 2)* [1975] QB 373; [1975] 1 All ER 849; [1975] 2 WLR 389, is regarded by leading textbook writers as the high-level watermark of the law and procedure governing derivative actions in the sphere of company law. Lord Denning there traced its history and scope. He said ([1975] OB 373 at p 390 [1975] 1 All ER 849 at p 856 [1975] 2 WLR 389 at p 395):

It is a *fundamental principle of our law that a company is a legal person, with its own corporate identity, separate and distinct from the directors or shareholders, and with its own property rights and interests to which alone it is entitled.* If it is defrauded by a wrongdoer, the company itself is the one person to sue for the damage. Such is the rule in *Foss v Harbottle* (1843) 2 Hare 461. The rule is easy enough to apply when the company is defrauded by outsiders. *The company itself is the only person who can sue* ...

(see p 429 of the judgment)

[72] The last case relied upon by counsel for the defendants was *Semesta Insurance Underwriting Agency Sdn Bhd v Koperasi Insurance (M) Bhd and Anor ('MClS')* [2011] 3 MLJ 379 ('*Semesta's* case') where the court had filed separate suits against MClS arising out of winding up proceedings which was dismissed because a judgment in default which was the basis of the winding up was set aside before the winding up could be heard.

[73] Semesta and Christie filed separate suits against MClS Christie sued MClS in his capacity as a corporate nominee, shareholder and director of Semesta. Semesta sued MClS based on negligence and the tort of malicious prosecution. Christie's suit was identical to Semesta's suit. In so far as Christie was concerned, the Court had to decide on the following:

[20] The issues to be determined in Christie's claim in the D4 suit are as follows:

(a) whether Christie has any locus standi to commence action against MCIS for damage and defamation allegedly suffered by a company of which he is a corporate nominee, shareholder and director; and

(b) whether Christie has proven damage to his reputation and his claims for loss of income.

[74] In dealing with the elements necessary to prove malicious prosecution, the court held as follows:

> [52] The elements that need to be proven by a plaintiff in an action for malicious prosecution are set out in *45 Halsbury's Laws of England*, (4th Ed), para 490 which states as follows:
>
> 490 Malicious civil proceedings generally. In civil proceeding which result in damage to reputation, person or property a claim analogous to the claim for malicious prosecution may lie if those proceedings are undertalcen maliciously and without reasonable and probable cause. Only in exceptional circumstances wills such a claim succeed, because generally no damage can be proved.
>
> [53] With respect to malicious institution of winding up proceedings, para 493 (of the same book) provides that:
>
> A claim may be brought in respect of injury to reputation caused by maliciously and without reasonable and probable cause commencing bankruptcy proceedings against an individual or winding up proceedings against the company provided that the proceedings terminated favourably to the claimant.
>
> [54] To be actionable as a tort the action talcen by the defendant must have been without reasonable and probable cause, must have been instituted or carried on maliciously and have been terminated in the plaintiff's favour. The plaintiff must also prove damage (see *Halsbury's Laws of England*, Vol 45, (4th Ed), para 1340; *Vijendran a/l Ponniah v Bank of Commerce* [1998] 7 MLJ 418; [1999] 5 CLJ 69; *Lim Chee Kuo v Tin Pacific Bank Bhd* [1997] MLJU 472; [1999] 1 CLJ 270).
>
> *[55] Hence, in the present case, Semesta must prove the following ingredients in order to establish its claim for malicious prosecution on MCIS:*
>
> (a) *the session court action and the winding up proceedings against Semesta has commenced and terminated infavour of Semesta;*
>
> (b) *there is malice on part of MCIS in instituting those action/proce edings;*
>
> (c) *there is an absence of reasonable and probable cause; and*
>
> (d) *Semesta as the plaintiff must have suffered damage.*
>
> see p 400 of the judgment.

[75] In *Semesta*'s case the winding up was dismissed because the underlying judgment in default had been set aside. Hence, there was no determination of the merits of the action. Hence, Semesta had failed to establish the first element which was necessary to constitute the tort of malicious prosecution. Similarly in the present case, the winding up did not terminate in favour of P1. In fact, winding up was granted and was later stayed as PPPP had stepped in to support P1's application. Although the starting point may have been different, the outcome in both cases is not very different and both winding up proceedings i.e. in Semesta and P1's winding up may regarded as being on the same footing in that in both cases there was no real determination as there was no litigation

as such. In my view, the permanent stay of P1's winding up cannot likewise be regarded as a basis for a claim for malicious prosecution.

[76] The next point of importance that may be taken from *Semesta*'s case is the locus standi of Christie to sue for damages allegedly suffered by Semesta. The Court held that damages (if any) which are suffered by Semesta are not claimable by Christie. That is not to say that the door is completely closed to a shareholder or director. The avenue for a shareholder or director to sue when a tort is committed against the company was explained lucidly by Lord Bingham in *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1 and which was neatly reproduced in para 93 (p 408) of the judgment in *Semesta*'s case as follows:

> *Lord Bingham in Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1 stated the applicable principle is that where a company suffers a loss caused by a breach of duty to it, and a shareholder suffers a loss separate and distinct from that suffered by the company *caused by breach of a duty independently owed to the shareholder, each may sue to recover the loss to it* by breach of the duty owed to it but neither may recover loss caused to the other by breach of the duty owed to that other.

[77] It is worth mentioning here that the plaintiffs common pleaded case is for tort of abuse of process and malicious prosecution, which can only be targeted at P1 and not the directors. Here, P2 and P3 did not plead any independent cause of action as may warrant a claim against D1 and D2 as wrongdoers who may have caused P2 and P3 to suffer damages as a result of their wrongful actions.

[78] In my view, if a shareholder or director of a company intends to sue when a tort is committed against the company, then that shareholder or director may sue the tortfeasor provided he is able to establish his own independent cause of action. What this means is that a wrong done to a company is not a wrong done to a shareholder or director. The point that is to be culled from the *Semesta* case is that the company's cause of action is not one where the shareholder/directors may join in. Hence, they (shareholder/director) may only sue if they can independently establish some cause of action vis-a-vis themselves and the tortfeasor. Here, there was no independent and separate cause of action.

[79] As stated at the very outset of this judgment, the Plaintiffs here have joined in a common cause of action for the tort of abuse of process and malicious prosecution. In my view, the only party who can sue for the tort of abuse of process or malicious prosecution is P1 and not P2 and P3. They have not pleaded any independent cause of action against D1 and D2. Of course, in the statement of claim, there has been passing reference to damage to reputation but this is not an action for defamation. On this score, it is my conclusion that P2 and P3 lack the requisite locus standi to sue for malicious

prosecution and/or abuse of process. Hence, on this point alone P2 and P3's claim ought to be dismissed. However, for completeness, I shall deal with P2 and P3's claim for damages which they claim to have suffered as a result of the winding up proceedings against P1.

QUANTUM/MITIGATION

P3's losses

[80] P3 said that she suffered damages because she was 'blacklisted' in the CTOS database as a consequence of being a director of P1 which was wound up and she could not obtain a loan from Bank Muamalat for RM500,000 in order to acquire a property (see Q&A 34 PW1A). In the statement of claim, it has been pleaded that she applied to Bank Muamalat for a loan of RM500,000 and was rejected (see para 14 (iii) statement of claim). During the trial, she said the refinancing was for renovations.

[81] In support of this P3 relied upon a letter dated 28 May 2014 which she had written to Bank Muamalat (p 519 Bundle B3) rendering her explanation to the bank and informing them that the winding up had been stayed. At this juncture, it is relevant to note that the CTOS database search itself carries an endorsement that the winding up may eventually be stayed (see p 522 Bundle B3).

[82] Counsel for the defendants submitted that P3 had not produced any evidence of any application by P3 for a loan facility. Also counsel pointed out that in her witness statement PW1A, P3 had stated that the loan was to acquire a property whereas during cross-examination she said that the loan was by way of refinancing for renovations.

[83] In my view, the point was correctly taken during cross-examination of P3 in that she had not demonstrated the requisite paper trail to show that there was an application to Bank Muamalat for a loan or for refinancing. Also, there is no evidence as to how the loan/refinancing monies are to be utilised and why after the winding up order was permanently stayed, the application for loan/refinancing could not be revisited. There is no evidence that P3 had lost a commercial/business deal or any property purchase opportunity.

[84] As such, it is my view that these alleged losses have not been credibly proven. In any event, the question of difficulties or obstacles that may be faced by directors of a company that has been wound up in terms of loans/refinancing are all too remote and nebulous and are quite remote and do not fall within the real of foreseeability. In the circumstances, on quantum, I

am constrained to hold that P3 has not proven any losses. In any event, P3 has to overcome the obstacle of mitigation of damages, which I will touch upon shortly.

P2's losses

[85] P2 says that he suffered loss of RM4.5m which is the amount he invested when he bought 50% of the issued shares in Vatratech Solution Sdn Bhd. According to paragraph 14 (i) of the Statement of Claim, P2 could not open an account at OCBC Bank for Vatratech Solution Sdn Bhd as he was named as a director of a company which had been wound up. It reads as follows,

> (i) *Apabila Plaintif Kedua ingin membuka akaun di OCBC Bank untuk Vatratech Solution Sdn Bhd, pihak OCBC telah menolak permohonan Plaintif Kedua* atas sebab noma Plaintif Kedua disenaraikan sebagai pengarah syarikat Plaintif Pertama yang telah digulungkan. Ini amat memalukan, merosakkan reputasi baik Plaintif Kedua serta merugikem Plaintif Kedua; ...

[86] However, during the trial it was clearly established that Vatratech Solution Sdn Bhd maintains an account with OCBC Bank Berhad and that P2's real complaint was that the bank refused to allow him to be a signatory to the company's account with the Bank. There are several problems with the P2's claim.

[87] First, P2's pleaded case (para 14 (i) of the statement of claim) and his evidence are at variance with each other. The complaint at trial was completely different from what was pleaded in the statement of claim.

[88] Secondly, there is no evidence that P2 was not allowed to be a signatory to Vatratech Solution Sdn Bhd's account with OCBC Bank Berhad.

[89] Thirdly, whatever losses that P2 says he suffered may well have everything to do with the management (or mismanagement) of Vatratech Solution Sdn Bhd rather than the fact that he was not or could not become a signatory to the company's bank account.

[90] Fourthly, the fact that P2 would be encountering difficulties with Vatratech Solution Sdn Bhd's corporate account in OCBC Bank Bhd or that he would suffer losses due to his inability to be a signatory to the bank account and unable to control the finances of the company etc are all far too remote to fall within the realm of any foreseeable loss damage.

[91] Next, there is no evidence that Vatratech Solution Sdn Bhd has suffered losses and/or that P2 has in fact sustained a loss of RM4.5m.

[92] Lastly, I am unable to comprehend why or on what basis OCBC Bank Bhd can lawfully prevent P2 from becoming a signatory to the corporate account of Vatratech Solution Sdn Bhd as it is not the bank's concern as to who become the signatories to the bank account. That is solely the prerogative of the account holder, ie Vatratech Solution Sdn Bhd.

[93] For those reasons, I hold that P2 has not proven any damages.

MITIGATION OF DAMAGES

[94] The last topic that I will deal with is mitigation of damages. Here, I find it quite perplexing as to why no steps were taken to oppose the winding up petition. P3 was fully aware of the s 218 notice and the winding up petition. She said that she was negotiating with PPPP.

[95] She conceded that she did not take steps to oppose the winding up petition in court. I have great difficulty in accepting P3's explanation in this regard. If indeed they were concerned about the repercussions on themselves as directors if there were to be a winding up order against P1, then P3 (and P2) ought to have acted reasonably and responsibly and taken appropriate steps to strike out the petition or to have it dismissed on the basis that it was an 'unauthorised' winding up petition.

[96] Also, there is no evidence as to what those in control of PPPP did about the fate of the petition which had been wrongfully filed. However, PPPP's conduct is not under scrutiny here. What is important is the conduct of P2 and P3 as directors of P1 and in particular, the latter (P3) as she was the person who seemed to be in control of all matters in P1. Further she was the previous Chairperson of PPPP. it was therefore incumbent upon her to act reasonably and responsibly when P1 was faced with a winding up petition which she knew or ought to have known was an unauthorised legal proceeding in the name of PPPP, which had been engineered by D1 and D2. In any event, the moratorium was still in place and as such a winding up petition could not have been filed in those circumstances.

[97] In the circumstances, I agree with the submissions made by counsel for the defendants that there was no attempt at mitigation of damages. In this situation, the logical thing to do would have been for P3 to prevail upon PPPP to instruct the solicitors to withdraw the petition.

[98] For all the reasons as stated above it is my view that there was no mitigation of damages whatsoever by P2 and P3. The next connected issue is whether it can be said that P1 also failed to mitigate its damages by failing to oppose the Petition at the very least on the grounds that the petition was not

authorised by PPPP and/or that there was a moratorium in place. As a matter of principle, I see no reason why P1 cannot likewise be said to have failed to have mitigated its damages.

[99] In my view, P1 is equally liable for failing to mitigate, which in the circumstances, could have been easily done by prevailing upon PPPP to withdraw the petition which would have obviated the need for any application for a permanent stay and consequently there would have been no legal expenses associated with the filing of such an application.

[100] Based on the evidence, the submissions and the case law that has been discussed above, the following are my conclusions on the issues that were framed at the end of the trial:

LIABILITY

1)	Issue:	Whether the issuance of the s 218 notice dated 5 July 2013 and filing of the winding-up petition on 23 September 2013 was done by the solicitors Messrs Jeffrey Wong Nurul Ho & Lim pursuant to the letter of instructions dated 28 June 2013 by D1 (p 377 B2) and the subsequent letter by D2 dated 24 September 2013 (p 41 Bl)?
	Findings:	From the matrix of evidence, it is clear that PW5 acted on the instructions that were issued by D1 and D2. There was no other operating cause which would have impelled PW5 to commence winding up proceedings against P1.
2)	Issue:	Whether the letters by D1 and D2 at p 377 B2 and p 41 B1 respectively are binding on the PPPP?
	Findings:	The impugned letters issued by D1 and D2 at p 377 B2 and p 41 B1 respectively are not binding on PPPP as they were issued by persons who had no authority to do so and the letters or instructions were neither ratified or condoned by PPPP subsequently.
3)	Issue:	Whether the letter by D1 at p 377 B2 was withdrawn at anytime?
	Findings:	There is no evidence that D1's letter was withdrawn. PW5 has confirmed that as far she was concerned, there was no withdrawal whatsoever.
4)	Issue:	Whether the findings made by the Judge in Kuala Lumpur High Court OS No 24BNCVC-1228–07 of 2013 with respect to the conduct of D1 and those who acted on his instructions after the Annual General Meeting on 8 June 2013 can be reviewed by this court?
	Findings :	There was no appeal against the decision made in the OS and the findings of fact are immune from review as they are res-judicata. Those findings are both relevant and admissible.

5)	Issue:	Whether D1's payment of costs of RM2,500 which was ordered against him by the Shah Alam High Court by way of the order dated 4 April 2014 granting a permanent stay of the winding up order is significant in the context D1's liability for the wrongful filing of the winding up petition?
	Findings:	D1's payment of costs of RM2500 as ordered by the court in the OS shows that D1 had implicitly accepted that he was liable for wrongfully giving the instruction for filing the petition. Further, the order dated 4 April 2014 also ordered D2 to pay costs. This also impacts upon D2's liability.
6)	Issue:	Whether SPB had been terminated as property manager as at 27 June 2013 (p 492B2)?
	Findings:	SPB was terminated with effect from 27 June 2013 and this is borne out by D1's own evidence (Q7 of DW1A) where he alluded to the fact that P3 had terminated SPB after she took over as Chairperson of PPPP.
7)	Issue:	Whether D2 had the requisite legal authority to sign the winding up petition and affirm the affidavit verifying petition on behalf of PPPP?
	Findings:	D2 was only an employee of SPB and they (SPB) had no contractual or statutory authority to execute legal documents on behalf of PPPP. Further at the material time, SPB was terminated. Specifically, there was no delegation of power under cl 6 of the Second Schedule to the Strata Title Act 1985. There was also no Power of Attorney given by PPPP to SPB. Finally, PPPP has confirmed that the Petition was filed without authority.
8)	Issue:	Whether P2 and P3 being directors of P1 have any cause of action against D1 and D2 arising out of and/or in connection with the winding up order which was wrongfully filed?
	Findings:	Based on *Semesta*'s case, P2 and P3 have no locus standi to sue for malicious prosecution or abuse of process. There is no legal basis for P2 and P3 to have a common cause of action with P1 for malicious prosecution or abuse of process.
9)	Issue:	Whether the failure to add PPPP as a defendant in this suit is fatal?
	Finding:	At the very least PPPP should have been added as a nominal Defendant because it was PPPP which wound up P1 (albeit due to the wrongful actions of D1 & D2). Hence, PPPP could have been added without the Plaintiffs seeking any reliefs or costs against PPPP. It was of course open to D1 and D2 to have added PPPP as a party. However, no authority has been cited to this Court on this point. However, given the circumstances in the present case, the real wrongdoers are D1 and D2 and so, PPPP's non-inclusion as a party is not fatal to the plaintiffs' claim.

	QUANTUM	
1)	Issue:	Whether P2's claim for RM4.5m is a foreseeable loss or was too remote?
	Findings:	P2's claim for RM4.5m was too remote.
2)	Issue:	Whether P2's claim for RM4.5m has more to do with the management of Vatratech Solution Sdn Bhd rather than due to his name being in the CTOS records?
	Findings:	P1's claim for RM4.5 million (if at all there was such a loss) would have had more to do with the management of Vatratech Solution Sdn Bhd rather that due his name being in the CTOS record.
3)	Issue:	Whether D1 and D2 are responsible or liable for P2's inability to become a signatory to Vatratech Solution Sdn Bhd's cheque account?
	Findings:	D1 and D3 cannot be held liable for P2's inability to become a signatory to the corporate account of Vatratech Solution Sdn Bhd in OCBC Bank Berhad.
4)	Issue:	Whether P3 could have gone ahead with the renovations by getting re-financing after the winding up order was lifted?
	Findings:	There is no reason why P3 could not have gone ahead with renovations after the winding up order had been permanently stayed.
5)	Issue:	Whether P3's claim for RM500,000 is a foreseeable loss or is it too remote?
	Findings:	P3's so-called loss is too remote. Also, it cannot be classified as a loss as P3 could have obtained refinancing or taken a loan after the winding up order was permanently stayed.

THE OUTCOME

[101] Hence, the outcome is that P1 has succeeded in establishing liability against D1 and D2 for the tort of abuse of process, but had failed to mitigate its losses. As such, P1 succeeds in liability but fails on quantum. As for P2 and P3, they have both failed on liability and quantum.

THE ORDER

[102] In the result, I made the following orders :

(a) P1's claim is allowed on liability but dismissed on quantum;

(b) P2 and P3's claims are dismissed on liability and quantum; and

(c) As for costs, I hereby order D1 and D2 to jointly and severally pay costs of RM30,000 to P1. In view of D1 and D2's egregious and inexcusable conduct, I make no order as to costs in respect of P2 and P3's claims which were totally dismissed.

P1's claim on liability allowed but on quantum dismissed; P2 and P3's claims on liability and quantum dismissed.

Reported by Kanesh Sundrum